UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES, Appellee, vs. **ZACARIAS MOUSSAOUI** Appellant.	No. 06-4494 Crim No. 01-455-A

APPELLANT'S REPLY IN SUPPORT OF MOTION FOR PARTIAL RELIEF FROM THE PROTECTIVE ORDER TO PERMIT ZACARIAS MOUSSAOUI TO HAVE UNRESTRICTED ACCESS TO ADVICE OF COUNSEL

Appellant Zacarias Moussaoui, through undersigned counsel, respectfully submits this reply in support of his Motion for Partial Relief from the District Court's Protective Order ("Motion").

I. THIS COURT SHOULD GRANT PARTIAL RELIEF FROM THE PROTECTIVE ORDER.

The Government does not dispute that, except for extraordinary circumstances, courts cannot interfere or restrict the communications between lawyer and client. *See Geders v. United States*, 425 U.S. 80 (1976); *Perry v. Leeke*, 488 U.S. 1 (1983). ***First***, unrestricted communications are necessary to ensure that a defendant's decisions are informed and counseled. ***Second***,

unrestricted communications between counsel and client ensure that counsel are able to investigate the case properly and prepare proper legal arguments. ***Third***, attorney-client communication free of interference is essential to the development and maintenance of trust between lawyer and client. Indeed, restrictions that unduly interfere with the communication between lawyer and client deprive the client of effective assistance of counsel, and mandate reversal. *Geders*, 425 U.S. at 91 (restricting communication between counsel and client is structural defect).

Where the Government possesses classified information to be disclosed to the Government, it has myriad options from which to choose – at its discretion – to satisfy disclosure obligations – including producing non-classified substitutes or redacted versions of the classified document. *See* Opening Br. at 39-40. The Government has never attempted to find any substitute for the great majority of the classified information in this case; as a result, the Government attempted to satisfy its constitutional requirements by producing to the defense counsel only the ***classified substitutes*** for certain information. As this Court is aware, this procedure has continued on appeal. The Government's choice – not the defendant's, his counsel's, or the Court's – has had the unavoidable result of grossly and unnecessarily interfering with the ability of Mr. Moussaoui and his counsel to communicate.

At bottom, free communication and advice between lawyer and client lies at the heart of our adversary process and is at the core of the Sixth Amendment right to counsel. As a result of the protective order entered by the district court, undersigned counsel cannot communicate openly with our client about critical evidence before the district court and information produced during this appeal. Without relief from these restrictions – or production of adequate non-classified substitutes that can be shared with Mr. Moussaoui – Mr. Moussaoui simply will not and cannot receive effective assistance of counsel in this direct appeal.

II. THE GOVERNMENT'S ARGUMENTS AGAINST THIS LIMITED RELIEF ARE WITHOUT MERIT.

The Government essentially makes five arguments in its Opposition. Each of these arguments is without merit.

First, the Government cites a number of cases ***not involving classified information*** in which courts have upheld narrow limitations – under extraordinary circumstances – on attorney-client communications, and the Government argues that the restrictions in this case are supported by that precedent. Not so. In each of the cases cited by the Government, courts upheld a short-term limitation on communications to address a specific danger; that is clearly not the circumstance present here. Thus, for example, in *Morgan v. Bennett*, 204 F.3d 360, 365 (2d Cir. 2000), the Second Circuit concluded that "a

carefully tailored, limited restriction on the defendant's right to consult counsel" was permissible where a potential witness had complained to the police about threats by the defendant. Under those circumstances, the trial court informed the defendant's lawyer that the witness would be testifying the next day, but restricted the lawyer from telling that fact to the defendant. *Id.* at 368. The Second Circuit upheld this limited restriction on those facts, but emphasized that "[t]here was no blanket prohibition against communication between Morgan and his attorney; there was no restriction on their ability to discuss any other facet of the case." *Id.* In *United States v. Herrero*, 893 F.2d 1512 (7th Cir. 1990), on the other hand, during a sidebar conference at a pretrial hearing, prosecutors inadvertently disclosed to the court and to the defendant's counsel certain information about a confidential informant, and the trial court entered a protective order that barred the defense counsel from sharing this information with the defendant. The Seventh Circuit concluded that the defendant – and indeed defense counsel – was never entitled to this information in the first place, and the restriction on sharing thus could not have violated the Sixth Amendment right to counsel. *Id.* at 1526-27. *Herrero* has no bearing here, where the defense was entitled to the information under the Constitution and the rules of discovery. *See United States v. Smith*, 750 F.2d 1215, 1217 (4th Cir. 1984) (CIPA "does not

change the standards for determining relevance and admissibility"). Similarly, in *United States v. Anderson*, 509 F.2d 724 (9th Cir. 1974), there was no actual restriction on the communications between lawyer and client because both had been excluded from the challenged *in camera* hearing.[1] *Id.* at 730. Again, the true conclusion to be drawn from each of these cases is that courts cannot broadly restrict a lawyer from discussing important evidence with the client.

Second, the Government cites a number of recent cases involving classified evidence – including *United States v. Bin Laden*, 2001 WL 66393 (S.D.N.Y. Jan. 25, 2001), *United States v. Ressam*, 221 F. Supp. 2d 1252 (W.D. Wash. 2002), and *United States v. Paracha*, 2006 WL 12768 (S.D.N.Y. Jan. 3, 2006) – in which other district courts apparently have imposed restrictions akin to those imposed here. To the extent that these courts did what the district court did here – order that information ***had to be produced to the defendant*** and then permit the Government to produce classified information (in lieu of non-classified substitutes) to defense counsel with orders that it could not be shared or discussed by defense counsel with the defendant – those courts were incorrect. These cases

[1] While the Ninth Circuit – in *dicta* – suggested that it would be possible in limited circumstances to permit a lawyer to participate *in camera* without the client, that participation would only be possible to determine *whether* the information should be produced. *Id.* at 729-30. Again, here the challenged

also demonstrate the danger in creating "exceptions" to constitutional rights. These recent cases have taken earlier decisions, which approved exceedingly narrow restrictions for short periods under emergency circumstances, and have expanded the applicability of those restrictions to cover all of the evidence that the defendant needs to know. These kinds of restrictions are patently inconsistent with *Geders* and *Perry*, and the right to counsel.

Third, the Government highlights the sensitive nature of the classified evidence here as a basis for restricting the ability of undersigned counsel to communicate freely with the client. The Government ignores here that it never *attempted* to produce non-classified substitutes of this information. Instead, it would provide to defense counsel substitutes that were still classified. *See* Opening Br. at 51-52. The Government has many options to avoid production of classified information to the defendant; what it cannot do is only produce the classified versions and restrict counsel from discussing this evidence with the client. In other words, having ignored the provisions of the Classified Information Procedures Act ("CIPA"), 18 U.S.C. App. III, the statute directly addressing this situation, and having declined to produce non-classified substitutes for this information, the Government's argument has little force.

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information clearly had to be produced to the defendant.

Fourth, the Government makes a handful of procedural arguments about why this Court should not consider this argument at this time. For example, the Government argues that Mr. Moussaoui is attempting to "pre-litigate" the merits. On the contrary, undersigned counsel are currently restricted in the same fashion – and by the same protective order – that applied to trial counsel, and this protective order is adversely affecting the relationship with the client and impeding the appeal. It is entirely appropriate to raise this issue at this time. Similarly, the Government appears to make some sort of procedural default argument. Again, this is not a fair or reasonable position under the circumstances because: (1) Mr. Moussaoui and his counsel repeatedly and specifically requested that Mr. Moussaoui receive access to this information and were ordered ***not*** to raise this issue any further, *see* Opening Br. at 56-59, 88, and (2) the restrictions on the ability to communicate plainly caused the deterioration of the relationship between lawyer and client in the district court.[2] This issue has been properly

[2] Mr. Moussaoui sought to proceed *pro se* precisely because he believed, based on the restrictions imposed by the trial court, that his counsel was part of the Government's efforts to ensure his conviction and death sentence. *See* JA222 ("Under the cover of assistance of counsel, . . . the United States are orchestrating my sending to the safe haven, Bosnia style."). Indeed, in the District Court, Mr. Moussaoui "denounce[d]" what he perceived to be his counsel's "misconduct and . . . intentional ineffective assistance." JA220. He believed that his counsel was engaged in "deception" and a "sophisticated version of the Troy horse."

preserved.

Finally, the Government suggests that there is no prejudice here. However, as *Geders* itself makes clear, there is no need for a showing of prejudice on this kind of restriction. *Geders*, 425 U.S. at 91 (reversing conviction without regard to harmlessness of error). Moreover, undersigned counsel have specifically identified the prejudices here and in the Opening Brief. *See supra* at 1.

In short, this Court should order relief from the protective order to permit Mr. Moussaoui to have effective assistance of counsel.

III. ALTERNATIVELY, THE GOVERNMENT SHOULD COMPLY WITH CONGRESS'S DESIGN IN HANDLING CLASSIFIED INFORMATION IN CRIMINAL CASES.

At bottom, the Government should have followed the procedures set forth in CIPA. *See* 18 U.S.C. App. III. As Mr. Moussaoui argued in his Opening Brief, CIPA sets forth a constitutionally permissible means by which to introduce unclassified evidence derived from classified sources without disrupting attorney-client communications and relationships. Here, the Government still has the option to produce non-classified substitutes that defense counsel can discuss fully with our client, and it may exercise that right here.

JA222.

CONCLUSION

For the reasons set forth above, the Court should grant Mr. Moussaoui's request for limited relief from the Protective Order.

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February 29, 2008

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of February, 2008, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit, via hand delivery, the required copies of the foregoing **Appellant's Reply in Support of Motion for Partial Relief from Protective Order to Permit Zacarias Moussaoui to Have Unrestricted Access to Advice of Counsel** and further certify that I served the required copies of the same via first class mail, postage paid, this same date from Richmond, Virginia to counsel listed below.

The necessary filing and service was performed in accordance with the instructions given me by counsel in this case.

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